BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

JOHN PERANZI, VALLIE JO FRY AND TONY AND ISOBEL CAIRONE, Petitioners, v. CITY OF OLYMPIA, Respondent, and, PANZA, a Not for Profit Corporation, Intervenor.	Case No. 11-2-0011 **COMPLIANCE ORDER**

THIS Matter came before the Board for hearing on November 5, 2012 following submittal of the City of Olympia's (City) Compliance Report [1] filed in response to the Board's May 4, 2012 Final Decision and Order (FDO). The Petitioners filed objections[2] to which the City responded.[3]

The compliance hearing was held telephonically and was attended by Board members Nina Carter, Raymond Paolella and William Roehl with Mr. Roehl presiding. The Petitioners were represented by Heather L. Burgess and Matthew R. Kernutt. Panza did not participate. The City was represented by Darren Nienaber.

[1] Filed October 2, 2012.
[2] Petitioners' Objections to a Finding of Compliance, filed October 16, 2012.
[3] Response to Objections, filed October 23, 2012.

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I. BURDEN OF PROOF

Following a finding of non-compliance, the jurisdiction is given a period of time to adopt legislation to achieve compliance.[4] After the period for compliance has expired, the Board is required to hold a hearing to determine whether the local jurisdiction has achieved compliance.[5] For purposes of Board review of the comprehensive plans and development regulations adopted by local governments in response to a non-compliance finding, the presumption of validity applies and the burden is on the challenger to establish the new adoption is clearly erroneous.[6]

In order to find the City's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made".[7] Within the framework of state goals and requirements, the Board must grant deference to local governments in how they plan for growth:

> The legislature intends that the board applies a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. . . Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.[8]

In sum, the burden is on the Petitioners to overcome the presumption of validity by demonstrating the action taken by the City is clearly erroneous in light of the goals and requirements of chapter 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2). Where not clearly erroneous and thus within the framework of state goals and requirements, the planning choices of the local government must be granted deference.

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[4] RCW 36.70A.300(3)(b).
[5] RCW 36.70A.330(1) and (2).
[6] RCW 36.70A.320(1), (2) and (3).
[7] *Department of Ecology v. PUD 1*, 121 Wn.2d 179, 201, (1993).
[8] RCW 36.70A.3201, in part.

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II. PRELIMINARY MATTERS

The Petitioners' original challenge involved the City's adoption of Ordinance No. 6771 (which amended City development regulations). That Ordinance authorized a permanent "County Homeless Encampment" as a conditional use on property within the City's Light Industrial Zoning District. The Board concluded in the FDO that the Petitioners carried their burden of proof to demonstrate the City's action violated RCW 36.70A.130(1)(d) as the adopted development regulations were inconsistent with and failed to implement two Comprehensive Plan Policies: LU 18.4 and LU 18.5.

The City subsequently sought "clarification" by way of a motion filed on June 8, 2012.[9] The City stated its chosen avenue of compliance was to amend Policies LU 18.4 and LU 18.5 but that Petitioners argued doing so was precluded by RCW 36.70A.130(2). That statute provides comprehensive plan amendments may only be considered once each year.

The RCW 36.70A.130(2) preclusion of such amendments more often than once each year is subject to the following exception: "However, . . . [a] City may adopt amendments or revisions to its comprehensive plan . . . to resolve an appeal of a comprehensive plan filed with the growth management hearings board. . . ."[10]

Petitioners argued their challenge only addressed development regulations; not the Comprehensive Plan. They therefore took the position the City could not take action to achieve compliance by amending the Comprehensive Plan as the exception does not apply. That is, the City was not faced with resolving an appeal of a comprehensive plan.
The Board found to the contrary, basing its decision primarily on RCW 36.70A.300(3)(b), which directs the Board to remand noncompliant GMA actions to the jurisdiction for the purpose of achieving compliance within a specified time. Additionally, the Board interpreted

[9] Respondent's Motion for Extension of Time and Motion for Clarification.
[10] RCW 36.70A.130(2)(b).

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RCW 36.70A.130(2)(b) exception as authorizing the correction of non-compliant comprehensive plan amendments.[11]

III. ISSUE TO BE DECIDED

Whether the City of Olympia's action in response to the Board's FDO appropriately addresses the violations of RCW 36.70A.130(1)(d)?

IV. DISCUSSION

The Petition for Review raised three issues, the first of which alleged the City's adopted development regulation amendments were inconsistent with and failed to implement the City's Comprehensive Plan.[12] The specific statutory violation raised by the Petitioners in that issue, and the one addressed by the Board in the FDO, involved RCW 36.70A.130(1)(d). In the FDO the Board found City Ordinance 6771 to be non-compliant with the Growth Management Act (GMA) as the adopted development regulations were inconsistent with and failed to implement Comprehensive Plan Policies LU 18.4 and LU 18.5. Specifically, the record did not support a conclusion that authorizing a permanent homeless encampment within the light industrial zone would complement or support industrial development pursuant to Policy LU 18.4. Policy LU 18.5 precludes land uses in industrial districts which would be incompatible with industrial uses. Based on the record before it, the Board concluded the contemplated residential use, a homeless encampment, did not complement or support industrial development and would be incompatible with industrial uses, thus violating RCW 36.70A.130(1)(d).

The compliance action taken by the City amended those two Plan Policies as indicated below (underlining indicates the amended language):

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[11] "The exception was provided by the Legislature to avoid the conundrum the City would face if the Board's order found comprehensive plan violations. If the Board had done so, the exception would allow the City to achieve compliance within the time allotted by the Board pursuant to RCW 36.70A.300(3)." Order On Motion For Clarification, at 3.

[12] Issue 2 asserted the City's action resulted in internally inconsistent development regulations while Issue 3 was a request for a determination of invalidity. The Board found Petitioners had failed to meet their burden of proof on either issue.

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> LU 18.4 Preserve industrial districts for industrial use. Limit non-industrial uses in industrial districts to those uses which complement or support industrial development. This could include associated offices, restaurants, warehouses, day care facilities, parks and recreational facilities, and other similar uses, except a County homeless encampment on County owned property may be allowed through a process designed to impose reasonable compatibility measures. Such encampment on a County owned property as well as complementary or supportive uses should be limited in size and number so that they do not unduly deplete the industrial land base, preempt the siting of industrial uses, or elevate land prices to levels that deter industrial development.
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> LU 18.5 Prohibit land uses in industrial districts which would be incompatible with existing or potential industrial uses. A County permanent homeless encampment on County owned property may be allowed through a process designed to impose reasonable compatibility measures. Consider providing notices on the title of property within a specified distance of industrial districts to make existing and prospective landowners aware of the nature of the industrial district, in an effort to minimize incompatible land uses and nuisance complaints.

Petitioners now argue the City's actions failed to achieve compliance, asserting the City's action violated GMA requirements, each of which is addressed below. They request that the Board enter a Determination of Invalidity,[13] stating establishment of a permanent homeless encampment is already in progress.[14]

The City first contends much of Petitioners' argument attempts to shift the burden of proof to the City. It argues it is incumbent upon the Petitioners to establish the City's compliance action was clearly erroneous and thus overcome the presumption of validity. Suffice it to say, the burden of proof remains with the Petitioners.

1. Annual Comprehensive Plan Amendments-RCW 36.70A.130(2)(b)

Petitioners' primary focus in challenging compliance is a reassertion of their earlier argument that RCW 36.70A.130(2)(b) precludes the City from amending its comprehensive

[13] RCW 36.70A.302.
[14] Petitioners' Objections to a Finding of Compliance, at 2.

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plan to achieve compliance.[15] That statute provides that proposed comprehensive plan amendments may be considered by a jurisdiction no more frequently than once each year,[16] and all comprehensive plan proposals must be considered concurrently so as to ascertain the cumulative effect.[17] Those requirements are subject to the following exception: "However,… [a] city may adopt amendments or revisions to its comprehensive plan… to resolve an appeal of a comprehensive plan filed with the growth management hearings board…."[18] Petitioners observe they did not appeal a comprehensive plan amendment and, therefore, the exception does not apply.

While Petitioners expand somewhat upon their argument raised in response to the City's Motion for Clarification, the essence of their argument is identical to that asserted earlier and an issue upon which the Board has previously ruled. Further discussion and reanalysis at this time is unwarranted.[19]

2. Public Participation/State Environmental Policy Act

Petitioners then assert the City's actions violated applicable public participation requirements.[20] They argue the City relied on the "lengthy public process" leading to adoption of the original challenged Ordinance No. 6771 to satisfy public participation

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[15] See Petitioners' Request for Guidance and Supplementation of the Record, filed June 8, 2012, and Petitioners' Response to Respondent's Motion for Extension of Time and Motion for Clarification, filed June 18, 2012, the latter of which incorporates Petitioners' June 1, 2012 letter to the City and which was attached to the Petitioners' June 8 Request for Guidance and Supplementation.

[16] RCW 36.70A.130(2)(a).

[17] RCW 36.70A.130(2)(b).

[18] Id.

[19] WAC 242-03-830.

[20] Petitioners are permitted to raise issues related to public participation in regards to the legislative actions taken in response to a Board's finding of non-compliance. *Petree, et al. v. Whatcom County*, Case No. 08-2-0021c, Compliance Order (Aug. 14, 2009). Although the Board does not generally allow new issues to be raised in a compliance proceeding, an issue regarding adherence to public participation requirements during the County's attempt to achieve compliance is sufficiently related to the compliance proceeding itself and may be raised by a petitioner in the objections. Coordinated Cases *Butler, et al. v. Lewis County*, Case No. 99-2-0027c, *Panesko, et al. v. Lewis County*, Case No. 00-2-0031c, *Hadaller, et al. v. Lewis County*, Case No.08-2-0004, Compliance Order and FDO, at 17 (July 7, 2008). See also *1000 Friends (Futurewise) v. Thurston County***,** Case No. 05-2-0002, Compliance Order, at 22 (Nov. 30, 2007).

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requirements. Additionally, they allege, in a single sentence, a violation of the State Environmental Policy Act (SEPA) (Chapter 43.21C RCW).[21]

In regards to public participation, the City points to the following facts: notice was provided of a public hearing to be conducted by the City's Planning Commission, the public hearing was held on June 4, 2012 and the record was left open for written comments until June 8, 2012. Thereafter, the City Council adopted the Ordinance on August 21, 2012. Beyond that, the City contends Petitioners cited neither a GMA provision nor case law in support of their contention that public participation was inadequate.

The Board observes the Petitioners devoted but two conclusory sentences to their criticism of the City's public participation process. As the City stated, argument was limited and was unsupported by statutory reference or case law. The same is true of Petitioners' SEPA reference, which includes no argument whatsoever, merely a statement of fact. It is insufficient for a Petitioner to set forth conclusory statements lacking supporting argument.[22] Petitioners' suggestions of inadequate public participation and faulty SEPA compliance are deemed abandoned.[23] Even if that were not the case, Petitioners failed to meet their burden of proof to establish the actions of the City regarding public participation and SEPA were clearly erroneous.

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[21] RCW 36.70A.280 establishes the jurisdiction of the Board, including the power to rule on compliance with SEPA. RCW 43.21C.030 directs governmental entities, including cities, to include in all reports/ recommendations on proposals for legislation a detailed statement regarding, among other things, the environmental impacts of the proposal.

[22] *North Clover Creek, et al. v. Pierce County*, Case No. 10-3-0015, FDO (May 18, 2011), at 11: "[An issue *was abandoned when] other than repeating these statutes in the statement of Legal Issue 3, petitioners* have made no argument tied to these provisions. WAC 242-02-570(1) [now WAC 242-03-590(1)] provides in part 'Failure to brief an issue shall constitute abandonment of the unbriefed issue.' An issue is briefed when legal argument is provided. It is not enough to simply cite the statutory provision in the statement of the legal issue."

OSF/CPCA v. Jefferson County, Case No. 08-2-0029c, FDO, at 6 (Nov. 19, 2008): "With the exception of setting forth Issue 2 within an introductory section, it does not appear to the Board that [Petitioner] has presented any argument, written or oral, as to this issue. . . In addition, the Board finds no argument supporting Issue 7 . . . Although cursory reference to this issue was made in a footnote and an excerpt of the challenged provisions was noted within OSF's brief, this does not amount to briefing of the issue. Therefore, pursuant to WAC 242-02-570, the Board deems these issues abandoned."

WEC v. Whatcom County, Case No*.* 95-2-0071, FDO, (Dec. 20, 1995): "An issue not addressed in petitioner's brief is considered abandoned."

[23] The Board observes the City Planning Commission conducted a public hearing following notice and kept the record open for several days thereafter to allow for further comment.

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3. Internal Comprehensive Plan Inconsistency

Petitioners also assert the compliance amendments render Land Use Comprehensive Plan Policies LU 18.4 and LU 18.5, as well as Policies LU 7.2, LU 8.4, LU 8.5 and LU 18.1[24] and the Light Industrial designation definition internally inconsistent in violation of RCW 36.70A.070 (preamble).[25] Petitioners reference each of those comprehensive plan policies and point out what they perceive to be internal plan inconsistencies which result from the City's compliance amendment.

4. Interjurisdictional Coordination

Petitioners also suggest, referencing RCW 36.70A.100 and WAC 365-196-640(1)(a), that the City failed to coordinate with the adjacent City of Tumwater as that municipality expressed concern with the proposed location of the permanent homeless encampment.[26] The City states it notified Tumwater of its consideration of the proposed Comprehensive Plan amendments and observes "The GMA does not require that Olympia must agree with every issue that a neighboring jurisdiction raises…."[27]

5. County Wide Planning Policy Inconsistency

Finally, Petitioners suggest the City's actions were inconsistent with County Wide Planning Policy No. IV which calls for a "rational and fair process for siting public capital facilities that every community needs, but which have impacts that make them difficult to site," relating this allegation to their argument that homeless encampments should be treated as essential

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[24] Those polices are set out in their entirety on Exhibit A.

[25] RCW 36.70A.070(Preamble): "The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140."

[26] RCW 36.70A.100: "The comprehensive plan of each county or city that is adopted pursuant to RCW 36.70A.040 shall be coordinated with, and consistent with, the comprehensive plans adopted pursuant to RCW 36.70A.040 of other counties or cities with which the county or city has, in part, common borders or related regional issues."

WAC 365-196-640(1):"Each county or city should provide for an ongoing process to ensure:

(a) The comprehensive plan is internally consistent and consistent with the comprehensive plans of adjacent counties and cities. See WAC 365-196-500 and 365-196-510;. . . ."

[27] Response to Objections, at 4.

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public facilities under RCW 36.70A.200 (EPFs). They contend the City's process fell short of being "rational and fair," supposedly because the siting of a permanent homeless encampment was not treated as an EPF.

The above referenced allegations of internal comprehensive plan inconsistencies (RCW 36.70A.070 (preamble)), inadequate interjurisdictional coordination (RCW 36.70A.100) and a lack of consistency with county wide planning policies (RCW 36.70A.070) were not included in the Petitioners' PFR. The GMA violations alleged in the PFR asserted the failure of the adopted development regulations to be consistent with and to implement the comprehensive plan, a violation of RCW 36.70A.130(1)(d). The GMA, Board rules,[28] and a long line of Board decisions[29] preclude a petitioner (or compliance participant[30]) from raising issues on compliance which are beyond the nature, scope and statutory basis of the prior noncompliance order. Therefore, allegations of a lack of compliance with RCW 36.70A.070 (preamble), RCW 36.70A.100 or RCW 36.70A.070 will not be considered by the Board in this compliance proceeding.

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[28] WAC 242-03-940 Compliance —(in part, emphasis added):
"(5) *Issues not within the nature, scope, and statutory basis of the conclusions of noncompliance in the prior order will not be addressed in the compliance hearing* but require the filing of a new petition for review.
(6) After a compliance hearing, *the board shall determine whether a state agency, city or county is in compliance with the requirements of the act as remanded in the final decision and order."*

[29] "In addition, ICAN bases objections to compliance on allegations that the County has violated two additional GMA provisions- [in addition to RCW 36.70A.110] RCW 36.70A.040(3) and RCW 36.70A.130(1)(d). The August 12, 2009 CO did not find the County out of compliance with those sections of the GMA and, therefore, it is beyond the scope of this proceeding to challenge Ordinance 09-1109-09 on that basis and the Board will not address such a challenge." *ICAN v. Jefferson County*, Case No. 07-2-0012c, Compliance Order at 4 (Jan. 27, 2010).
"Petitioner cannot raise this alleged internal inconsistency [an issue not raised in the original proceedings before the Board] for the first time at this [compliance] stage of the proceedings." *Panesko, et al. v. Lewis County,* Case No. 08-2-0007c, Compliance Order, at 4 (July 24, 2009). See also *Olympic Stewardship Foundation v. Jefferson County*, Case No. 08-2-0029c, Compliance Order, at 6 (July 7, 2009), and *ICAN v. Jefferson County*, Case No. 07-2-0012c, Compliance Order, at 10 (Aug. 4, 2009).
"The June 20, 2006 Final Decision and Order/Compliance Order did not find noncompliance on any of these issues, therefore these issues are not before the Board for compliance. For the Board to address these issues, Petitioners needed to file a new petition. Petitioners have not done so, so these issues are not before the Board to decide." Coordinated cases: *Ludwig, et al. v. San Juan County*, Case No. 05-2-0019c; *Klein, et al. v. San Juan County*, Case No. 02-2-0008; *Campbell, et al. v. San Juan County*, Case No. 05-2-0022c; Order on Compliance, at 30 (Jan. 30, 2009).

[30] WAC 242-03-930(2).

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Petitioners have failed to meet their burden of proof to overcome the presumption of validity applicable to the City's compliance action.

V. ORDER

Based on the foregoing, the Board determines the City of Olympia, through adoption of Ordinance No. 6809, has addressed the findings of noncompliance in the Board's May 4, 2012 Final Decision and Order. The Board finds and concludes the City of Olympia is in compliance with the Growth Management Act. The case is CLOSED.

Dated this 16th day of November, 2012.

_____
William Roehl, Board Member

_____
Nina Carter, Board Member

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Raymond Paolella, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[31]

[31] Should a party choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-3-830(1), WAC 242-3-840.
A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.0
5.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970.
It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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EXHIBIT A

LU 7.2 Incorporate the following provisions regarding identification and siting of essential public facilities in the applicable zoning ordinance:
a. Essential public facilities are public facilities and privately owned or operated facilities serving a public purpose that are typically difficult to site. They include:
(1) Airports; state education facilities; state or regional transportation facilities; prisons, jails and other correctional facilities; solid waste handling facilities; inpatient facilities such as group homes, mental health facilities and substance abuse facilities; sewage treatment facilities; secure community transition facilities; and communication towers and antennas; (Ord. #6195, 07/03/02)
(2) Facilities identified by the State Office of Financial Management as essential public facilities, consistent with RCW 36.70A.200; and
(3) Facilities identified as essential public facilities in the applicable zoning ordinance.
b. Essential public facilities may be allowed as permitted or conditional/ special uses in the applicable zoning ordinance, not preclude the siting of an essential public facility in the City or, as applicable, in the unincorporated growth area. Essential public facilities listed as conditional/special uses in the applicable zoning district shall be subject to the following requirements in addition to other applicable conditional/special use

LU 8.4 Establish zoning and design standards that ensure compatibility of adjoining residential and commercial areas, in order to maintain or enhance the neighborhood's character, livability, and property values. Consider requiring commercial structures to use building scales, roof forms, and building materials similar to, or compatible with, the adjoining residential structures; "low key" signage; and carefully controlling site lighting that minimizes off-site impacts. (Also see Commercial Goals and Policies.)
a. Require the facades of buildings adjoining residential districts to incorporate elements such as upper story step backs, offsets, wide roof overhangs, recesses, and other architectural features which reduce the perceived building scale. The larger the building, the greater the number and variety of such elements that may be required to achieve the perception of a smaller building scale.
b. Establish requirements to prevent the formation of a continuous wall of multistory structures adjoining a lower intensity residential district. Include one or more of the following approaches in these requirements:
(1) Require building floors above two or three stories which face a street or residential district to be stepped back;
(2) Require building floors above three stories to be tiered as necessary to ensure that the adjoining residences are not shaded in winter for more than a few hours per day;
(3) Limit the dimension of the walls of commercial, public, and multifamily buildings facing and within 100 feet of a lower intensity residential district to a specified proportion of the lot width and/or establish a maximum wall length;
(4) Limit the number of buildings with more than three floors within a specified area (e.g., two such buildings per block); and

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(5) Establish requirements for building setbacks from property lines, which adjoin a significantly lower density district, that increase with the height and bulk of the structure
(6) The provisions described above should take into account the height, bulk, and nature of the uses allowed in the adjoining lower intensity district (e.g., setbacks may be less when commercial uses adjoin a multifamily district with multi-story buildings than when they abut single family residences).
c. Prohibit use of reflective exterior materials on building surfaces (except windows) where the associated glare would pose a nuisance for nearby residents (e.g., considering the orientation of the residential structures and tree cover).
d. Require parking lots for commercial uses to be screened from the view of residents in adjoining lower intensity residential districts.
e. Establish minimum setbacks or require other remedial measures to minimize glare, noise, odor, or pollution impacts from commercial facilities or operations that would pose a nuisance for nearby residents.
f. Require refuse containers and mechanical equipment, including equipment on roofs, to be fenced or otherwise screened from view from lower-density districts and public rights-of way.
g. Locate and design the exits and entrances to parking lots for non-residential projects to minimize use of streets in adjoining residential neighborhoods. Allow exceptions where necessary to avoid traffic hazards or significantly improve traffic movement or the site design. (See the Transportation Chapter.)

LU 8.5 Require effective landscaped buffers (e.g., berms with evergreen trees and bushes) and/or transitional uses (e.g., pedestrian plazas or low intensity offices) between incompatible industrial, commercial, and residential uses to mitigate noise, glare, and other impacts associated with the uses.
a. Where possible, use natural boundaries or buffers (e.g., wetlands, ravines, stands of windfirm trees) to separate incompatible uses. Also consider using access drives and heavily landscaped parking lots to help provide a transition between significantly different uses or densities of development.
b. Require clustering where warranted to create buffers or open space to provide an open space to provide a transition between uses.

LU 18.1 Encourage industrial development which diversifies and strengthens the local economy, and is compatible with surrounding land uses.

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